Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1125

JACK SANDERS CORPORATION,
Petitioner

VERSUS

THE UNITED STATES,
Defendant

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF UNITED STATES COURT OF CLAIMS

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STATUTES AND REGULATIONS

ARMED SERVICES PROCUREMENT REGULATION 7.603.27, being THE SAME AS 32 CFR 7.603.27 — 4

CASES

VICTORY CONSTRUCTION CO., INC. VERSUS THE UNITED STATES, 510 F2d 1379 (1975) — 5,11,19

IN THE

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NO._____

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Petitioner

VERSUS

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PETITION FOR CERTIORARI

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA

COMES NOW Jack Sanders Corporation and petitions this Honorable Court for a writ of Certiorari to review the final judgment of the Court of Claims in the

cause entitled Jack Sanders Corporation versus The United States, being Number 79-75 on the Docket of that Court.

This case came to the Court of Claims on appeal under Rule 163 (b) (2) for review under The Wunderlich Act of a decision of the Corps of Engineers Board of Contract Appeals dated July 31, 1974 being ENG. BCA NO. 3363 styled Appeal of Jack Sanders Corporation, Contracts DACW 64-71-C-0022 DACW 64-71-0023 and DACW 64-71-0024.

The Court of Claims first entered an ambiguous order dated June 25 1976, affirming the Engineer Board's decision (which was in favor of the Defendant) and remanding for entry of Judgment in favor of plaintiff.

On Rehearing and Motion to Amend Judgment, The Court of Claims entered its Order dated September 30, 1976, affirming the Engineer Board's decision, which, in effect, is now

The Final Judgment of The Court of Claims.

The Board's decision is attached as Appendix I. The Court of Claims Order dated June 25, 1976, is attached as Appendix 2, and The Court of Claims Order dated September 30, 1976, is attached as Appendix 3.

JURISDICTION FOR REVIEW

A writ of certiorari to review The Final Order of The Court of Claims dated September 30, 1976, is sought pursuant to jurisdiction conferred by 28 U.S.C.A. 1255 (1) which reads as follows:

> 1255. Court of Claims; certiorari; certified questions
>
> Cases in the Court of Claims may be reviewed by The Supreme Court by the following methods;
> (1) By writ of certiorari granted on petition of The United States or the claimant:

QUESTIONS PRESENTED FOR REVIEW

The principal question presented for review is the correct interpretation of the Armed Services Procurement Regulations clause

designated ASPR 7-603.27 Variations in Estimated Quantities, which is required to be included in Government procurement contracts where payment is made based on estimated quantity items. This clause, which is also codified as 32 CFR 7.603. 27 (1968), reads as follows:

> Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen percent (15%) above or below the estimated quantity stated in this contract, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred fifteen percent (115%) or below eighty-five percent (85%) of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, upon receipt of a written request for an extension of time within ten (10) days from the beginning of such delay, or within such further period of time which may be granted by the Contracting Officer prior to the date of final settlement of the contract ascertain the facts and make such adjustment for extending the completion date as in his judgment the findings justify.

The interpretation of this clause has been presented to the Court of Claims twice;

once in the case at bar and earlier in 1975 in the case of Victory Construction Co.,Inc. vs. United States. 510 F 2d 1379 (1975).

One panel of the Court of Claims construed the clause one way and another panel gives it an entirely different interpretation. This is an important provision of Government procurement law and we request that this Court accept the case to resolve the conflict between the two panels of the Court of Claims so that Government procurement people and the contractors dealing with them will know how a contractor will be paid when he bids on estimated quantities and experiences adjustable overruns within the meaning of the Variation in Estimated Quantities clause.

In the case at bar the plaintiff contractor bid on advertised procurements

for the removal of debris from specified geographical areas following Hurricane Celia. He was required to base his bids on Government estimates of the quantities of debris to be removed from each geographical area. He was a successful bidder on three contracts; San Patricio County, Texas, Contract DACW 64-71-C-0022; City of Portland, Texas, Contract DACW 64-71-C-0023; and City of Rockport, Texas, Contract DACW 64-71-C-0024; all awarded August 7, 1970. All contracts had the same bidding instructions, terms and conditions, including a variation in estimated quantities clause which appears as a note at the botton of the page containing pay items (standard form 36 continuation sheet), reading as follows:

> Variations in Quantities: The quantities shown in the schedule of the bid form will serve as a basis for completion of bids for the purpose of determining the low bidder. Payment will be made at the unit price for the actual quantity of work performed under each item be it more or less than the quantity estimated. However, if the actual quantity varies more than one hundred percent (100%) above or thirty percent below the estimated quantity stated in this contract, an equitable adjstment in the contract unit price shall be made upon demand of either party.

The contractor experienced substantial overruns over and above estimated quantities plus one hundred percent (100%) above estimated quantities on the three contracts as well as increased costs in removing the debris represented by these overruns, and has attempted to recover these increased costs pursuant to the Variation in Estimated Quantities clause.

It became immediately apparent that the Variation in Estimated Quantities clause appearing in the contracts was a deviant clause not found in the Armed Service Procurement Regulations and

differing in two important particulars from the standard clause therein contained (ASPR 7-603.27 (1968) above set forth).

First, the contract clause increased the permissable variation above estimated quantities to 100% as against 15% in the standard clause.

Second, the contract clause omitted that part of the standard clause which provdes the manner in which an equitable adjustment is to be determined which reads:

> ".....The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above....percent or below....percent of the estimated quantity...."

The increase in the permissable variation did not become an issue. The contractor understood that if, as in the San Patricio contract, the estimated quantity was 35, 000 cubic yards, and he bid $3.70 per cubic yard,

he would be paid $3.70 per cubic yard for the first 70,000 cubic yards and only the yardage above 70,000 cubic yards would be subject to a possible price adjustment under the variation in estimated quantities clause.

The Government representatives, from the Contracting Officer to the Assistant Attorney General for the Civil Division, have all taken the same position.

The question of how to arrive at an equitable adjustment of the contract price, however, was a horse of a different color, where no one agreed with anyone else.

The Contracting Officer paid the contractor the contract unit price which was bid on the Estimated Quantities for all actual quantities delivered on all three contracts; and in his Contracting Officers decision, he left the parties at that status quo.

The contractor appealed to the Corps of Engineers Board of Contract Appeals asking that the contract unit prices be increased on quantities in excess of 100% above Estimated Quantities to the extent that his unit costs increased on these quantities as compared with the unit costs on the Estimated Quantities plus 100% above Estimated Quantities.

The Government filed a counterclaim before the Corps of Engineers Board of Contract Appeals contending that the contract unit prices should be reduced by determining the average unit costs for all yardage, to which should be added 10% of such unit costs for profit, and thatthis figure would be the equitably adjustad price for the quantities in excess of 100% above Estimated Quantities.

The Corps of Engineers Board of

Contract Appeals decision, which is now the decision of The Court of Claims is to reprice the unit price of quantities in excess of 100% above Estimated Quantities so as to convert that part of thecontract to a cost plus a percentage of cost contract.

The same legal question was presented to another panel of the Court of Claims in Victory Construction Co., Inc. versus The United States, 510 F. 2d 1379 (1975) There the Government sought reduction of the unit prices on five pay items bid on estimated quantities where the contract contained the 1967 standard variation in estimated quantities clause (32 CFR 7.603. 27 (1967), which also contained no language indicating how to go about arriving at an equitable adjustment. That panel of the Court looked to the 1968 revision of the standard variation in quantities

clause, above quoted, for guidance in interpretation and said that it was clear from the language used that the clause does not contemplate a repricing of the contract price merely because there is a variation in quantities by more than 15% and that any repricing would be confined to the cost differentials directly attributable to the volune deviation greater than 15%. Thus this panel of the Court of Claims reversed The Corps of Enginners Board Contract Appeals and refused to reduce the contract unit prices on any of the overrun items which were bid on estimated quantities on the basis that the Government failed to show any decrease in costs due solely to the variation in quantities in excess of 15% above estimated quantities.

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The contractor in the Victory case was not seeking an increase in the contract prices so the court was not called upon to determine whether he would have been entitled to an increase in the contract price if he had shown an increase in his costs attributable to overrun exceeding 15% of estimated quantities.

Comparing the Victory case to the case at bar. the Government failed to show a decrease in costs attributable to the volume overrun in both cases, but got a price reduction in the case at bar. Further, the contractor in the case at bar affirmatively proved a cost increase directly attributable to the volume overrun in excess of 100% above estimated quantities precisely in accordance with the criteria laid down in the Victory case.

Another similarity in the cases is that in both cases the Government

seeks to penalize an efficient contractor who keeps his costs down by repricing his contract price to give him only his cost plus an arbitrary proportion of his costs as profit on overrun quantities.

STATUTES AND REGULATION INVOLVED

The only statute involved is 32 CFR 7.603.27 (1968) which is the same as ASPR 7.603.27 as above set out in its entirety.

STATEMENT OF CASE

The basic facts are set forth above. The plaintiff proved, and the Corps of Engineers Board of Contract Appeals found, that the plaintiff contractor had increased costs due solely to volume overruns on quantities on his three contracts as follows:

(a) San Patricio county - contract No. DACW 0022, $1.70 per cu. yd. on 107,972 cu. yds.

(b) City of Portland - contract No. DACW 0023, $3.05 per cu. yd. on 7,477 cu. yds.

(c) City of Rockport - contract No. DACW 0024, .21 per cu. yd. on 41,273 yds.

Consistent with the interpretation of the variation in Estimated Quantity Clause in The Victory Construction Case, Supra, and by the plain unambiguous wording of the Variation in Estimated Quantities Clause, these increased costs due solely to the variation in quantities above 100% of estimated quantities, should be added to the contract price on the three contracts resulting in the following final contract prices.

(a) San Patricio County - contract 0022; $3.70 per cu. yd. on first 70,000 cu. yds., $3.70 + $1.70 or $5.40 per cu. yd. on the overrun of 107,972 cu. yds. Since the contractor has already been paid $3.70 per cu. yd. for this yardage, the government owes the contractor $1.70

per cu. yd. on 107,972 cu. yds.

(b) City of Portland - contract 0023; $3.50 per cu. yd. on first 50.000 cu. yds., $3.50 + $3.05 or $6.55 per cu. yd. on overrun 7,477 cu. yds. Since the contractor has been paid $3.50 per cu. yd. for this yardage, the government owes the contractor $3.05 per cu. yd. on 7.477 cu. yds.

(c) City of Rockport - contract 0024; $3.07 per cu. yd. on first 10,000 cu. yds.; $3.07 + .21 or $3.28 per cu. yd. on overrun 41,273 cu. yds. Since the contractor has been paid $3.07 per cu. yd. for this yardage, the government owes the contractor .21 per cu. yd. for 41,273 cu. yds.

JURISDICTION OF THE COURT OF CLAIMS

This case arose from contracts having a disputes clause which is subject to judicial review under the Wunderlich Act,

41 USCA 321,322.

The facts with respect to the costs incurred by the plaintiff - contractor were stipulated after audit by the contractor's auditor. The C.P.A. also allocated the costs attributable to estimated quantities plus 100% above estimated quantities, often called first costs in the record; and costs attributable to quantities in excess of 100% above estimated quantities, often called second costs in the record. Since the plaintiff corporation had no other contracts before or since these three contracts, it was relatively easy to accurately determine and allocate these costs. The Engineer Board accepted the stipulated costs and the allocation of costs and found such other facts as were necessary to the decision. Consequently, the case

came to the Court of Claims on a question of law only, namely, the application of the Variation in Estimated Quantity clause to the facts found by the Board.

The case came on for hearing before The Court of Claims on Cross Motion for Summary Judgment under the Court of Claim Rule 163 (b)(2).

ARGUMENT

The argument in support of plaintiff contractor's position is inherent in the facts heretofore set forth. There is, to our knowledge, no precedent except The Victory Construction Company case heretofore cited.

The Variation in Estimated Quantities Clause states in plain language that the adjustment shall be based upon any increase or decrease in costs due solely to the variation.....

If there is an increase in costs

due to the variation, the contractor is entitled to have such increase in costs added to the contract price he bid for the work on the effected adjustable quantities. If there is a decrease in costs due to the variation, the Government is entitled to have the decrease subtracted from the contract price on such effected adjustable quantities. If there is neither an increase or a decrease. the contract price stays the same.

That is the holding of Victory Construction Company Incorporated Versus United States, 510 F. 2d 1379 (1975).

RESPECTFULLY,

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CERTIFICATE OF SERVICE

I, EDWARD H. KEILER, Attorney of Record for the petition, Jack Sanders Corporation, hereby certify that I have this day mailed, air mail postage prepaid, 3 true copies of the foregoing petition for certiorari, to The Honorable Solicitor General, Department of Justice, Washington. D.C. 20530 and 3 true copies of this foregoing petition for certiorari to Hon. Rex E. Lee, Assistant Attorney General, Civil Division, Department of Justice, Washington, D.C. 20530, and three true copies of the foregoing petition for certiorari to Honorable Gerald L. Schrader, Attorney, Civil Division, Department of Justice, Washington, D.C. 20530 as service on the defendant, the United State of America and its counsel of record in this case.

This the 28th day of December 1976

Edward H Keiler

EDWARD H. KEILER

APPENDIX 1

DEPARTMENT OF THE ARMY
Office of the Chief of Engineers
Washington, D.C. 20314

Before the Corps of Engineers Board of
Contract Appeals

Eng BCA No. 3363

Appeal of

JACK SANDERS CORPORATION

Contract Nos. DACW64-71-C-0022,
0023 & 0024

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OPINION BY ADMINISTRATIVE JUDGE JELLICO

The question in this appeal requires that we determine the unit price to be applied to quantities in excess of those provided for in the Variation in Estimated Quantities provision of the contract.

The three contracts from which the dispute arises were for removal and disposal of debris caused by Hurricane CELIA which struck the Gulf Coast of Texas in the summer of 1970. The contract provisions pertinent to the dispute are identical in each of the three contracts. The only differences in the contracts relate to the geographical area to be cleaned up, the estimated quantity of material to be removed and disposed of in each geographical area, and the price bid under each of the three contracts. Contract No. DACW64-71-C-0002 calls for cleanup of San Patricio County, Texas, Contract No. DACW64-71-C-0023 of the city of Portland, Texas, and Contract No. DACW64-71-C-0024 of the city of Rockport, Texas. We shall hereinafter refer to the three contracts simply as the San Patricio, Portland and Rockport contracts.

The format of contract used was entitled "Contract for Dismantling, Demolition or Removal", apparently in an attempt to follow the format provided in the Armed Services Procurement Regulations, paragraph 16-404, which is entitled "Contracts for Dismantling, Demolition or Removal of Improvements". ASPR 16-404 and its implementing subparagraphs do not prescribe inclusion of a "Variation in Estimated Quantities" clause. However, on the face of the bid pay schedule in the present contracts was printed the following "Variation in Estimated Quantities" clause:

> Variations in Quantities: The quantities shown in the schedule of the bid form will serve as a basis for completion of bids for the purpose of determining the low bidder. Payment will be made at the unit price for the actual quantity of work performed under each item be it more or less than the quantity estimated. However, if the actual quantity varies more than one hundred percent (100%) above or thirty percent (30%) below the estimated quantity stated in this contract, an equitable adjustment in the contract unit price shall be made upon demand of either party.

Appellant strongly maintains that the "Variations in Estimated Quantities" clause prescribed in ASPR 7-603.27 for construction contracts should have been inserted in the contracts and that the contracts should be read as if it had been inserted. If the ASPR construction clause is applicable it would contain a sentence not present in the contracts in dispute which reads:

> The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variations above. . . . . percent or below . . . . percent of the estimated quantity.

We do not perceive any real difference, in the context of the present dispute, between the Variation in Estimated Quantities provision printed on the face of the pay schedules and that prescribed by ASPR 7-603.27. Whichever is applicable, the dispute is with respect to which cubic yards of debris removed and disposed of are adjustable as beyond the permissible

percentage (100%) of the clause. There is testimony in the record that a government official at a pre-bid conference informed bidders that unit prices would be adjusted only upwards, not downwards. We do not believe that testimony credible. Even if believed, such an assertion by a government official will not prevail over the clear intent of the contract language that the adjustment machinery may be invoked for the benefit of either party.

Appellant contends that the basic contract units and the non-adjustable overrun are those removed and disposed of first. The government would treat all units removed and disposed of as fungible, giving no identifiable status to any of them in frame of time. These abstractly stated concepts should become clearer as we deal with specific facts and figures relevant to each of the three contracts. Before we turn to those facts and figures, other contract provisions bearing on the dispute will be mentioned.

The government places great emphasis upon the fact that the Technical Provisions describes the Scope of the work in the following broad terms:

> The work covered by this section consists of furnishing all labor, material and equipment and performing all work necessary for removal of all designated debris in or on all city streets, including side walks or if no side walk exists 15' back of curb on each side of the street, and in or on all alleys within the boundaries indicated in the schedule and designat-

ed on drawings and other areas including private property that may be designated. . . . .

All debris larger than six (6) inches maximum dimension will be removed. It may be necessary for the contractor to return to any given area several times to leave it in an acceptable condition. . . .

The area from which debris is to be removed is the entire area within the corporate city limits, as applicable.

Also, the SPECIAL CONDITIONS contain a provision which has some influence upon the decision which we reach. It provides:

PERFORMANCE SCHEDULE: Work shall commence within 24 hours after receipt of the notice to proceed by the Contractor and shall be completed within 15 calendar days after work commences. This allowable performance time shall be extended on a proportional basis for actual quantities in excess of estimated quantities stated in the schedules.

There was no "Changed Conditions" provision in the contract.

The parties have agreed by stipulation to many of the detailed facts and figures pertinent to the dispute. Except as otherwise stated, the facts and figures hereinafter recounted are embraced within the stipulations of the parties.

Each contract contained two bid items as follows:

1. Remove and Dispose of Debris within the [geographical location] as described in the Technical Provisions.

2. Furnish equipment and operator at dump site.

Appellant originally claimed under both bid items, but the parties have agreed that separate treatment of Bid Item No. 2 is unnecessary because of its relative insignificance and have merged it and its attendant costs into the dispute under Bid Item No. 1. Such an approach simplified presentation and consideration of the case and will make no appreciable difference in the outcome.

San Patricio Contract

This contract, like the other two, was awarded on 7 August 1970. The contract unit price was $3.70 per cubic yard, the estimated quantity 35,000. On 28 August 1970, appellant had removed and disposed of 70,000 cubic yards of debris. However, the debris generated from the hurricane had not been exhausted. Appellant continued to remove and dispose of debris through 10 October 1970. A total of 177,972 cubic yards of debris was disposed of. Therefore, there are 107,972 cubic yards for which the contract unit price is subject to adjustment.

Appellant's total costs under this contract were $362,079.30. A certified public accountant made an analysis of these costs and allocation as between the

period prior and subsequent to 28 August 1970. He determined the "prior" costs to be $70,498.58 and the "subsequent" costs to be $291,580.72. The government questions the allocation of certain items of cost as between the two periods but, because of its position as to the proper method to be used to compute the price adjustment of the 107,972 cubic yards beyond the 70,000 provided for in the original estimate plus the 100% subject to the Variation in Estimated Quantities clause, did not make its own allocation as between costs prior and subsequent to 28 August 1970. The items challenged are of no great consequence, relating only to overhead type items, whereas practically all of the costs incurred were direct in nature.

Using the CPA's allocation, appellant contends that its costs for the first 70,000 cubic yards was $1.00 per cubic yard ($70,498.98 ÷ 70,000) and that its costs for the last 107,972 cubic yards was $2.70 ($291,580.12 ÷ 107,972). Appellant contends that, since it made a profit of $2.70 per cubic yard [the contract price ($3.70) less its costs ($1.00)] on the first 70,000 cubic yards, that profit should be continued for the last 107,972 cubic yards and that the adjusted price for that yardage should be $5.40 ($2.70 profit plus its cost of $2.70). This is the basis for appellant's claim. Total contract earnings would be:

70,000 cubic yards @ $3.70	259,000.00
107,972 cubic yards @ 5.40	583,048.80
	842,048.80

The government challenges the claim on several grounds. Its most vehement challenge is to the con-

cept that the first 70,000 cubic yards of debris removed and disposed of is identifiable as the 35,000 contract quantity plus the 35,000 as to which price is not adjustable because of the Variation in Quantities clause. In other words, the government contends that the contracts do not contemplate price adjustments based upon comparison of costs expended in removal and disposal of the initial estimated quantities of debris plus 100% thereof with the cost expended under the contracts for removal of the remaining debris. The government argues that the contracts contemplated cleanup of an entire geographical area, and not merely removal of a certain amount of debris. Under its concept, it is not exclusively the cubic yards of debris removed subsequent to the first estimated quantities plus 100% that are subject to equitable adjustment. Rather, the overrun quantities should be considered to be distributed merely throughout the entire scope of work under each contract. Because of the large overrun quantities it became possible for appellant to achieve the initial contract estimate plus 100% overrun with use of large equipment at relatively low cost. As the debris became smaller and less isolated near the end of the job, its removal became more and more difficult and costly.

According to the government, the way to arrive at an equitable adjustment under this contract, and the other two, is to determine the total costs incurred by the appellant for material, labor and performance, including overhead; to add to this an appropriate factor for profit; and then divide the total contract cost plus allowable profit by the number of cubic yards of debris removed under the contract to arrive at what would be

an equitable price per cubic yard for the work. The estimated quantity of debris to be removed under each contract plus 100% thereof should be paid at the specified unit price. The remainder, i.e., the number of cubic yards subject to equitable adjustment, should be paid at the determined adjusted equitable price. In attempting to apply this formula, the government makes the following calculation for the San Patricio contract:

Start with total stipulated cost	$362,079.30
Divide by total cubic yards	177,972
Equals the cost per cubic yard	2.03
Multiply by the yards of overrun	107,972
Equals the cost of overrun	219,183.16
Add suggested 10% profit	21,918.32
Equals the total payment for overrun	$241,101.48
Divide by yards in overrun	107,972
Equals suggested equitable price	$ 2.23

The total contract earnings would be:

70,000 cubic yards @ $3.70	259,000.00
107,972 cubic yards @ $2.23	241,101.48
	500,101.48

Portland Contract

This contract also was awarded on 7 August 1970. The contract unit price was $3.50 per cubic yard and the estimated quantity of debris 25,000 cubic yards. On 28 August 1970, appellant had removed and disposed of 50,000 cubic yards. Performance continued and was

completed on 4 September 1970. A total of 57,477 cubic yards was disposed of, making 7,477 cubic yards subject to adjustment.

Appellant's total costs were $111,413.79. This amount was broken down by appellant's CPA as $77,039.00 incurred before and $34,374.79 after 28 August 1970. Under appellant's theory, its costs for the first 50,000 cubic yards was $1.54 per cubic yard ($77,039.00 ÷ 50,000) and for the last 7,477 cubic yards was $4.59 (34,374.79 ÷ 7,477). Appellant contends that, since it made a profit of $1.96 per cubic yard [the contract price ($3.50) less its cost ($1.54)] on the first 50,000 cubic yards, that profit should be continued for the last 7,477 cubic yards and that the adjusted price for that yardage should be $6.55 ($1.96 profit plus its cost of $4.59). Total contract earnings would be:

50,000 cubic yards @ $3.50	$175,000.00
7,477 cubic yards @ 6.55	48,974.35
	$223,974.35

Using reasoning similar to that for the San Patricio contract, the government would calculate the adjusted price for 7,477 cubic yards as follows:

Start with total stipulated cost	$111,413.79
Divide by total cubic yards	57,477
Equals the cost per cubic yard	1.94
Multiply by yards in overrun	7,477
Equals cost of overrun	14,505.38
Add suggested 10% profit	1,450.54
Equals the total payment for overrun	$ 15,955.92
Divide by yards in overrun	7,477
Equals suggested equitable price	$ 2.13

11a

Total contract earnings would be:

50,000 cubic yards @ $3.50	$175,000.00
7,477 cubic yards @ 2.13	15,955.92
	190,955.92

Rockport Contract

This contract also was awarded on 7 August 1970. The contract unit price was $3.07 per cubic yards and the estimated quantity of debris 5,000 cubic yards. On 14 August 1970, appellant had removed and disposed of 10,000 cubic yards. Performance continued and was completed on 7 October 1970. A total of 51,273 cubic yards was disposed of, making 41,273 subject to adjustment.

Appellant's total costs were $109,627.06. This amount was broken down by appellant's CPA as $19,100.07 incurred before and $90,527.99* after 14 August 1970. Under appellant's theory, its cost for the first 10,000 cubic yards was $1.91 per cubic yard ($19,100.07 ÷ 10,000) and for the last 41,273 cubic yards was $2.12* (90,527 ÷ 41,273). Appellant contends that since it made a profit of $1.16 on the first 10,000 cubic yards, that profit should be continued for the last 41,273 cubic yards and that the adjusted price for that yardage should be $3.28 ($1.16 profit plus its costs of $2.12). The total contract earnings would be:

10,000 cubic yards @ $3.07	$ 30,700.00
41,273 cubic yards @ 3.28	135,375.44
	166,075.44

* There are mathematical errors in these computations made by appellant, but since they do not affect the result of our decision we leave them as presented.

12a

Using reasoning similar to that for the other two contracts, the government would calculate the adjusted price for 41,273 cubic yards as follows:

Start with total stipulated cost	$109,627.06
Divide by total cubic yards	51,273
Equals the cost per cubic yards	2.14
Multiply by the yards in overrun	41,273
Equals the cost of overrun	88,324.22
Add suggested 10% profit	8,832.42
Equals the total payment for overrun	$ 97,156.64
Equals suggested equitable price	$ 2.35

The total contract earnings would be:

10,000 cubic yards @ $3.07	$30,700.00
41,273 cubic yards @ 2.35	97,156.64
	127,856.64

DECISION

While the matter is not entirely free from doubt, we have come to the conclusion that appellant's, rather than the government's, theory better identifies the yardage of debris which is subject to adjustment.

We start with the thought that, except for inclusion of the Variation in Quantities clause in the contract, appellant would have been entitled to be paid at the contract unit price, no more and no less, for each of the cubic yards disposed of. When a price adjustment comes into play we find it a more logical concept to apply the adjustment after the basic contract concept has been applied rather than to introduce an artificial con-

cept of fungibility of all the material as the government would have us do. Such an artificial concept will often be necessary because of difficulties in allocating costs to units produced as to time of production. but the difficulties of allocation in the present case are very minor.

We are persuaded that appellant's reading of the contract as to which units are adjustable is more compatible with the literal terms of the contract. This conclusion is reinforced by the fact that it is consistent with the way time is to be adjusted for overrun quantities. The contract provides that the time for performance is to be extended on a proportional basis for actual quantities in excess of estimated quantities stated in the schedule. This approach is inconsistent with the government's theory that the contract, as written, gives recognition to the fact that the easy quantities were to be achieved first and the harder quantities later. If this theory prevailed in the writing of the contract document, then it should have been contemplated that the overrun quantities would have taken more time than the original quantities for performance. To be consistent more than a proportional time extension would be provided for overruns.

We have determined that we accept appellant's theory of the case. We do so only because we consider ourselves bound by a literal construction of the contract. We are well aware that the government's theory of the case is the more equitable one because it was undoubtedly true that the first debris removed was the easiest and that removal became more difficult near the end for a number of reasons. However, we must

apply the contract as we find it since we have no power of reformation. If an inequitable result prevails, it is because the wrong contract was made to begin with. Furthermore, the inequity was not mitigated by inclusion of a Changed Conditions clause.

While we accept appellant's identification of the units to be adjusted, we do not accept its suggested manner of repricing those adjustable units. Appellant's suggested manner of adjusting the adjustable overrun would continue its profit per unit earned during the early part of the work to the units performed during the more difficult later stages of the work. We do not accept such an obviously inequitable approach. While we have indicated that we feel bound to accept what may be an inequitable application of the basic contract as written, we are not obliged to extend that interpretation in making the adjustment. Indeed, we are precluded from doing so for the contract itself calls for an equitable adjustment. Perhaps, the inequitableness of appellant's contention as to how the adjustment is to be made is best illustrated by envisioning the reverse of the situation which occurred here. Suppose that a contractor were shown to have suffered a loss on the original, unadjusted quantities. It is inconceivable that the loss should be imposed on repriced quantities. The unit price for the adjustable quantities should be based upon the reasonable cost of such quantities plus a fair profit.

We are not fully satisfied with our record as a basis for repricing the price for the adjustable units. The proof both of the reasonable cost and of a rate of fair profit for performing this cleaning work is unsatisfac-

tory. Nevertheless, we make the best of the record that we have by accepting the government's unrefuted suggestion as to profit rate and appellant's CPA's "prior" and "subsequent" cost allocations. While the government has cast some doubt upon these allocations, it has not attempted to make similar allocations of its own and, in any event, the items as to which it raised questions are not substantial in the final figures.

We fix appellant's earnings on the adjustable units under the three contracts as:

San Patricio	cost	$291.580.72
107.972 cubic yards	profit	29,158.07
	earnings	$320,738.79
first 70,000 cubic yards		259,000.00
Total contract earnings		$579,738.79
Portland	cost	$ 34,374.79
7,477 cubic yards	profit	3,437.48
	earnings	$ 37,812.27
first 50,000 cubic yards		175,000.00
Total contract earnings		$212,812.27
Rockport	cost	$ 90,527.99
41,273 cubic yards	profit	9,052.80
	earnings	99,580.79
first 10,000 cubic yards		30,700.00
Total contract earnings		$130,280.79

Recapitulating the total contract earnings are computed as follows:

	Appellant	*Government*	*Board*
San Patricio	$ 842,048.80	$500,101.48	$579,738.79
Portland	223,974.35	190,955.92	212,812.27
Rockport	166,075.44	127,856.64	130,280.79
	$1,232,098.59	$818,914.04	$922,831.85

The appeal is allowed in part and denied in part as indicated above.

Date: 31 July 1974

/s/ JOHN P. JELLICO
JOHN P. JELLICO
Administrative Judge
Chairman of Board

/s/ JOHN H. RYAN
JOHN H. RYAN
Administrative Judge
Member of Board

/s/ HORACE C. REOSTI
HORACE C. REOSTI
Administrative Judge
Member of Board

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I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decision No. 3363, appeal of JACK SANDERS CORPORATION, under Contract Nos. DACW64-71-C-0022, 0023 & 0024.

Date:

FRANCES H. ACETO
Recorder

IN THE UNITED STATES COURT OF CLAIMS

NO 79-75

JACK SANDERS CORPORATION

VERSUS

THE UNITED STATES

Sam O. Buckley, attorney of record, for plaintiff, Keiler & Buckley, of counsel.

Gerald Schrader, with whom was Assistant Attorney General, Rex E. Lee, for defendant.

Before COWEN, Chief Judge, DURFEE Senior Judge, and SKELTON, Judge.

O R D E R

This case comes before the court on the parties' cross motions for summary judgment under Rule 163 (b)(2) in a case involving a review under the Wunderlick Act of a decision rendered by the Corps of Engineers Board of Contract Appeals. Plaintiff was awarded three contracts for removal and disposal of debris caused

by hurricane "Celia"., which struck the Gulf Coast in 1970. The actual quantities of debris removed by plaintiff substantially exceeded the quantities estimated in the contracts. The sole issue is the amount of the equitable adjustment to which plaintiff is entitled for removal of the excess, and the answer requires only an interpretation of the "Variations in Quantities" clause of the contracts. Thus, the case involves a question of law with no factual disputes.

Upon consideration of the Motions and briefs and after hearing oral argument, the court finds that the decision of the Board is supported by substantial evidence and is correct as a matter of law.

IT IS THEREFORE ORDERED that the decision of the Board is affirmed in all respects; plaintiff's motion for summary judgment is denied; defendant's cross motion for

summary judgment is also denied, and its counterclaim is dismissed.

IT IS FURTHER ORDERED that this case is hereby remanded to the trial judge in order to give the parties an opportunity to enter into a stipulation for the entry of a judgment in favor of plaintiff in accordance with the decision of the Board; provided, however, that if no such stipulation is entered into within 30 days from the date of this order, the trial judge shall remand the case to the Board in order that it may make an administrative determination of the amount of the equitable adjustment due plaintiff on the contracts pursuant to the Board's decision of July 31, 1974.

BY THE COURT

June 25, 1976

S/ WILSON COWEN

Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

NO. 79-75

JACK SANDERS CORPORATION

VERSUS

THE UNITED STATES

SAM O.BUCKLEY, attorney of record, for plaintiff, Keiler & Buckley, of counsel.

Gerald Schrader, with whom was Assistant Attorney General Rex E. Lee, for defendant.

BEFORE COWEN, Chief Judge, DURFEE, Senior Judge, and SKELTON, Judge.

O R D E R

This case comes before the court on Defendant's Motion for an Order Amending the court's order of June 25, 1976, and Plaintiff's Motion for Re-hearing. The motions of both parties state that in their brief and argument to the court, they failed to properly explain or clarify the effect of

the decision of the Corps of Engineers Board of Contract Appeals and consequently, that no final judgment can be entered in conformity with the court's order.

Upon consideration of the parties' motions, the court finds that:

1. On the three contracts the total contract price which the contracting officer allowed and paid to plaintiff was the sum of $1,017,074.01, less a discount of $50,853.71 withheld by the contracting officer because of prompt payment by the government, or a total net payment of $966,220.30.

2. In support of its counterclaim in the hearing before the Board, the government contended as follows:

> Should the Board determine the Appellant to be entitled to an increase in contract price, under any of the concerned contracts then the United States believes that it would upon payment of such monies within the discount period be entitled to a 5%

> prompt payment discount. On the other hand, should the Board reach an equitable adjustment decreasing contract prices, the United States would expect to allow Appellant a credit equal to the prompt payment discount and recover only 95% of the determined reduction.

3. In the hearing before the court and in its Motion to Amend the Order of June 25, 1976, the Government took an entirely different position regarding the claimed cash discount. Before the court the government contends that if the Board's determination of the adjusted contract price is adopted, the amounts found by the Board should be further reduced by a discount of 5 percent. Even if it should be decided that the contractual provision covering cash discounts is applicable to the adjusted contract prices, the court finds that this contention is erroneous and rejects it, because it fails to credit the contractor with

the previously deducted discount and would impose the discount for prompt payment twice: once upon the original payments made by the contracting officer, and again upon the basis of the Board's decision.

4. The plaintiff admits that it has been paid the contract price as stated in paragraph 1 above, but has not admitted that the government is entitled to any discount on the "total contract earnings" as determined by the Board.

5. There is no indication in the Board's decision that it made any determination as to the applicability of the cash discount provision of the contracts to the adjusted contract prices found by the Board.

On the basis of the foregoing it is hereby

BEST COPY AVAILABLE

ORDERED that the court's order and judgment of June 25, 1976 is hereby amended in its entirety to read as follows:

This case somes before the court on the parties' cross motions for summary judgment under Rule 163 (b) (2) in a case involving a review under the Wunderlich Act of a decision rendered by the Corps of Engineers Board of Contract Appeals. Plaintiff was awarded three contracts for removal and disposal of debris caused by hurricane "Celia," which struck the Gulf Coast in 1970. The actual quantities of debris removed by plaintiff substantially exceeded the quantities estimated in the contracts. The sole issue is the amount of the equitable adjustment to which plaintiff and defendant are entitled for removal of the excess, and the answer requires

only an interpretation of the "Variations in Quantities" clause of the contracts. Thus, the case involves a question of law with no factual disputes.

Upon consideration of the motions and briefs of the parties and after hearing oral argument, the court finds that the decision of the Board as to the contractor's earnings on the adjustable units under the three contracts is supported by substantial evidence and is correct as a matter of law.

IT IS THEREFORE ORDERED that the decision of the Board is affirmed and the case is remanded to the Corps of Engineers Board of Contract Appeals which is instructed to determine:

1. Whether the cash discount provision of the contract has any application to the adjusted contract price of the three contracts, and if so, how it is to be applied to each contract.

2. The amount of the equitable adjustment to which the government is entitled under the Board's decision on the San Patricio and Rockport contracts.

3. The amount of the equitable adjustment to which plaintiff is entitled under the Board's decision on the Portland contract.

4. The net amount which the government is entitled to recover on its counterclaim.

Pursuant to Rule 149, court proceedings shall be stayed for a period not to exceed 6 months in order to enable the Board to make the determinations stated above. Defendant's attorney is designated to advise the court, by letter to the trial judge, with a copy to opposing counsel, of the status of the proceedings on remand at intervals of 90 days or less.

IT IS FURTHER ORDERED that except as

stated above, the defendant's Motion to Alter or Amend the Judgment of June 25, 1976, and Plaintiff's Motion for Rehearing are each hereby denied.

September 30, 1976

BY THE COURT
S/ WILSON COWEN
Chief Judge